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November 28, 2008

Docket Management Facility  
U.S. Department of Transportation  
1200 New Jersey Avenue, SE., West Building  
Ground Floor, Room W12-140  
Washington, DC 20590-0001.

Re: WMS Services Rebuttal Comments to Docket No. FMCSA-2008-0204 –et seq.

### **I. Introduction**

My name is Chelsea A. Shaughnessy. I am a regulatory analyst employed by WMS Services. WMS Services is a small consulting service, based in southeastern Massachusetts. We offer select members of the marine and motor fuel dispensing, distribution, and transportation industry regulatory compliance interpretation and application options from which to make informed operational decisions.

### **II. Interest of WMS Services**

Our ability to provide clients with accurate compliance interpretation and application options is precluded by a multiplicity of conflicting federal, state and local regulations in the area of hazardous materials transportation and routing designations within the city of Boston. As such we have a direct interest in the outcome of this preemption determination proceeding.

The principles of WMS Services would like to thank you for providing this opportunity to express our views and rebuttal comments with respect to the Application by the American Trucking Association (ATA), and Massachusetts Highway Department (MAHighway) for a Preemption Determination of the City of Boston's Routing and Transportation Restrictions, and related Docket comments.

WMS Services supports a *Preemption Determination*<sup>1</sup> of Boston's current hazardous materials through Non-Radioactive Hazardous Materials (NRHM) routing and transportation prohibitions and restrictions by the Federal Motor Carrier Safety Administration (FMCSA).

WMS Services supports the ATA and MAHighway's preemption challenge. I will specifically address my rebuttal to those issues raised in comments submitted during the initial comment period closing on October 17, 2008. New issues will not be discussed. [73 FR 51335, September 2, 2008]

### **III. State Routing Agency**

MA Highway Department, within the Executive Office of Transportation and Public Works, is the designated state routing agency. MA Highway has *restricted* "ALL Hazardous Materials" from I-93 and I-90 Tunnels within the Massachusetts Metropolitan Highway System. These *restrictions* have been reported and published in the Federal Register<sup>2</sup>.

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<sup>1</sup> 49 CFR 105.5

<sup>2</sup> 65 FR 75771, December 4, 2000, 2000, Hazardous Materials Designated, Preferred and Restricted Routes.

MA Turnpike Authority, within the Executive Office of Transportation and Public Works<sup>3</sup>, has designated hazardous material *through-routes*, within the city of Boston. MA Highway has posted hazardous material *through-routes*, consistent with MA Turnpike Authority designations, within the city of Boston.

The through-routing restrictions and designations do not separate Radioactive (RAM) and Non-Radioactive Hazardous Material (NRHM) routing. Designations and/or preferred highway routes for RAM and NRHM have not been reported<sup>4</sup> to the Federal Motor Carrier Safety Administration (FMCSA).

These *restrictions* effectively force all inter and intra state motor vehicles subject to placarding to *through-route* upon *designated routes*,<sup>5</sup> or if *through-routes* are not designated to operation over routes which do not go through or near heavily populated areas, places where crowds are assembled, tunnels, narrow streets, or alleys.<sup>6</sup>

As posted the designations allow acceptable through-routing for vehicles subject to the highway restrictions.

#### IV. Rebuttal Discussion

##### A. Docket FMCSA-2008-0204-0003. MA Highway Application [73 FR 51335].

**Consistency of Boston's regulatory scheme on hazardous materials transportation in Boston remains consistent with Federal law in light of the history of the Boston regulation, changes that have occurred since the regulation's inception in 1980.**

1. City of Boston also has NRHM highway routing prohibitions, limitations, requirements, and designations.
  - a) The Docket(s) clearly shows Boston *established, maintained, and enforced*, NRHM routing changes, modifications, prohibitions, limitations, requirements prior to and after November 14, 1994.
    - 1) December 12, 1979. Boston Ordinances chapter 39 of 1979, Regulating the Transportation of Hazardous Materials [FMCSA-2008-0204-0004 Exhibit A]
    - 2) December 15, 1980. Boston Regulations - Transportation of Hazardous Materials [FMCSA-2008-0204-0004 Exhibit B, FMCSA-2008-0204-0015.1, Para I. Response To Specific DOT Requests For Comment, Docket FMCSA-2008-0204-0015.4 Exhibit B]
  - b) Boston Regulations were subject of an Inconsistency Ruling (IR) [46 FR 18918], appeal of the IR [47 FR 18457] and a US District Court hearing [No. 81-628-MA] submitted in Dockets FMCSA-2008-0204- 0015.2, and FMCSA-2008-0204-0003, Exhibit D.
  - c) Certain dates have significant value to the status of Boston's NRHM routing changes, modifications, prohibitions, limitations, requirements
    - 1) June 23, 1994. Central Artery / Tunnel Project Transportation of Hazardous Materials, study released [FMCSA-2008-0204-0004 Exhibit H]
    - 2) November 16, 1990. Enactment of the Hazardous Materials Transportation Uniform Safety Act. (HMTUSA) Public Law 101-615
    - 3) July 5, 1994. President Clinton signed Public Law 103-272 which extensively revised, codified and enacted without substantive change numerous laws related to transportation. The former HMTA, 49 App. U.S.C. 1801 *et seq.*, has been repealed and replaced by 49 U.S.C. Chapter 51 (5101 *et seq.*)
    - 4) October 12, 1994. Federal Highway Administration provides notice of Final Rule "Transportation of Hazardous Materials; Highway Routing" [FMCSA-2008-0204-0004 Exhibit J FR 51824]
    - 5) November 14, 1994. Effective date of regulations implementing the requirements of HMTUSA in a new 49 CFR part 397 Subpart C—Routing of Non-Radioactive Hazardous Materials [59 FR 51824]
    - 6) January 13, 2006. CA/T project. Substantial completion of the project took place in early 2006.
2. November 16, 1990

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<sup>3</sup> MGL Chapter 81A § 1

<sup>4</sup> Ibid. Publication required by the Hazardous Materials Transportation Act of 1975 (HMTA), as amended (49 U.S.C. 5112).

<sup>5</sup> 49 CFR 397.67(a)

<sup>6</sup> Ibid

- a) On November 16, 1990, the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA) (Pub. L. 101-615, 104 Stat. 3244) was enacted and amended the Hazardous Materials Transportation Act of 1975 (HTMA) (Pub. L. 93-633, 88 Stat. 2156). The FHWA was delegated the responsibility by the Secretary, as published in the **Federal Register** (56 **FR** 31343, July 10, 1991; 49 CFR 1.48), to implement subsections 105 (b) and (c) of the HTMA (now codified at 49 U.S.C. §§ 5112 and 5125 (**1994**), Pub. L. 103-272, 108 Stat. 745). This included the rulemaking and program responsibility for hazardous materials highway routing, with the exception of currently pending applications for inconsistency rulings and non-preemption determinations which remain a responsibility of the Research and Special Programs Administration (RSPA).
  - b) *Technical Amendment*: Public Law 103-272 (108 Stat. 745), enacted on July 5, 1994, codified certain U.S. transportation laws as title 49, United States Code. Like other transportation statutes, the Hazardous Materials Transportation Act was repealed and its contents restated in title 49. This final rule changes the citations contained in the NPRM to conform to the provisions of the new law.
3. November 14, 1994
- a) On September 24, 1992, the Federal Highway Administration (FHWA) published an interim final rule [57 **FR** 44132] amending 49 CFR 397 by adding a subpart E which established procedures applicable to preemption determinations and waivers of preemption. This final rule amends subpart E to make these procedures applicable to NRHM routing designations included in subpart C. Effective November 16, 1996, two years after the effective date of the regulation  
Any highway routing designation established, maintained or enforced by a State, a political subdivision thereof, or an Indian tribe is preempted if:
    - 1) *Dual Compliance* - Compliance with both the highway routing designation and any requirement of chapter 51 of title 49, United States Code [49 USC 5125(a) (1) and (2)], or of a regulation [49 CFR 397.203] prescribed thereunder is not possible;
    - 2) *Obstacle to Compliance* - The highway routing designation, as applied or enforced is an obstacle to accomplishing and carrying out chapter 51 of title 49, United States Code, or the regulations prescribed thereunder; or
    - 3) *Compliance With Federal Standards* - A State or Indian tribe establishes, maintains or enforces any routing designation that does not comply with the procedural and substantive requirements of the Federal standards set forth in this regulation.Any person, including a State, *political subdivision thereof*, or Indian tribe, affected by a NRHM routing designation can apply to the Administrator for a determination of whether such routing designation is preempted.  
A State, political subdivision, or Indian tribe may apply to the Administrator for a waiver of preemption. The Administrator is authorized to waive preemption of a NRHM routing designation, based on a determination that it provides equal or better protection to the public than these regulations would provide, and it does not unreasonably burden commerce.
  - b) Boston did not apply for a "Waiver of Preemption" or a "Determination of Preemption" after November 14, 1994.
4. Grandfathering of Boston's Regulations.
- a) The HTMA as amended by the HMTUSA, incorporated grandfather clauses. One clause provides that routing designations established before November 16, 1990, are not required to comply with the factors in § 49 CFR 397.71 of the regulation. Another clause provides that the routing designations established before the date of issuance of 49 CFR 397 do not have to be in accordance with the routing standards dealing with public participation, consultation with other jurisdictions, and timeliness.
  - b) On November 16, 1990, Boston had NO hazardous materials transportation regulation or routing requests for rulings or determinations pending before an Administration of the U.S. Department of Transportation
  - c) Boston's routing regulations and designations in place on November 14, 1994, **ONLY** enjoy *Grandfathering* under 49 USC 5125(c) which exempts compliance with Standards [49 USC 5125(c) and 49 CFR 397.71] pertaining to minimum procedural requirements which ensure public participation when the State or Indian tribe is establishing a highway routing designation, limitation, or

requirements; [49 USC 5112(b)(1) (B)], a requirement that, in establishing a highway routing designation, limitation, or requirement, a State or Indian tribe consult with appropriate State, local, and tribal officials having jurisdiction over areas of the United States not subject to the jurisdiction of that State or tribe establishing the designation, limitation, or requirement and with affected industries; [49 USC 5112(b)(1) (C)], and a requirement that establishing a highway routing designation, limitation, or requirement of a State or Indian tribe be completed in a timely way; [49 USC 5112(b)(1) (F)].

5. State Law

- a) Section 5125 of USC chapter 49 allows a *State, political subdivision of a State, or Indian tribe* to establish, maintain, or enforce a highway routing requirement if- (1) complying with the requirement of the State, political subdivision, or tribe and a requirement of chapter 51 of title 49, United States Code or 49 Code of Federal Regulation prescribed under chapter 51, or a hazardous materials transportation security regulation or directive issue by the Secretary of Homeland Security is *possible*; and (2) the requirement of the State, political subdivision, or tribe, as applied or enforced, *is not an obstacle* to accomplishing and carrying out chapter 51, a regulation prescribed under chapter 51, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.
- b) The Boston Ordinance of 1979 which provides Boston Fire, Health, and Transportation Departments with regulatory promulgation authority restricts regulations to compliance with State laws and regulations. The State of Massachusetts has laws and regulations which subject Boston's hazardous materials regulations and routing prohibitions, limitations, requirements, and designations to compliance with 49 CFR. These State laws and regulations are detailed in Docket FMCSA-2008-0204-0009, pages 8-10.

6. Coordinated Review of Boston's Regulations

- a) Boston's hazardous materials regulations cite federal Codes which have long since be amended, revised, or removed and identify hazardous material with terminology which is not consistent with current terminology in the Hazardous Materials Regulations (49 CFR Parts 117-180).
- b) Boston's hazardous materials regulations overlap the regulatory jurisdiction of two separate US Department of Transportation Administrations. Research and Special Projects Administration (RSPA) Parts 171-179 and the Federal Motor Carrier Safety Administration (FMCSA), Parts 390-397.
- c) A preemption determination review of Boston's regulations for consistency with Parts 390-397 by the FMCSA would not clear the sky of obstacles or dual compliance nor serve the applicants stated purpose. The Boston regulation bounces back and forth between Parts 390-397 and Parts 171-179, the jurisdiction of RSPA. A single FMCSA review would provide justice to the findings of Congress in enacting the HMTUSA. Both FMCSA and RSPA need to join in determining consistency and compliance or a joint review conducted under the Associate Deputy Secretary and Director, Office of Intermodalism.

7. Preemption.

- a) Historically DOT published rulings and determinations have NOT interpreted this so called *Grandfathering* to mean that the routing designations established prior to the publication of the final rule are not subject to Federal preemption. These NRHM routing designations are still subject to Federal preemption under 49 U.S.C. § 5125(a), if-
  - 1) Complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter [49 USC 5125(a) (1) and (2)] or a regulation [49 CFR 397.203] prescribed under this chapter is not possible [Dual Compliance]; or
  - 2) The requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter [Obstacle to Compliance].
- b) Section 397.219, limits the Administrator's waiver of preemption authority to routing requirements of the State and political subdivision, that affords the public a level of safety at least equal to that afforded by the requirements of the 49 USC chapter 51 and 49 CFR Part 397 under the HMTUSA and does not

unreasonably burden commerce. In determining whether the requirement of the State, political subdivision thereof, or Indian tribe unreasonably burdens commerce, the Administrator may consider the following factors:

- 1) The extent to which increased costs and impairment of efficiency result from the highway routing designation of the State or political subdivision;
  - 2) Whether the highway routing designation of the State or political subdivision has a rational basis;
  - 3) Whether the highway routing designation of the State or political subdivision achieves its stated purpose; and
  - 4) Whether there is need for uniformity with regard to the subject concerned and if so, whether the highway routing designation of the State or political subdivision competes or conflicts with those of other political subdivisions.
- c). Boston implemented hazardous materials transportation restrictions without regard for federal and state routing oversight, the federal standards, or public participation, thereby creating a regulatory scheme which shifts routing of hazardous materials into communities remote from the city who are not aware of or prepared for the potential impact of Boston's actions.
- d) Carriers subject to Boston's routing prohibitions and restrictions, to avoid Dual Compliance violations, now circumvent the city, to avoid city enforcement, using a route which traverses 2 counties, 17 communities, passes within 100 yards of 3 water supplies, covers 53.3 miles each way and depending on seasons and traffic takes up to 1.5 hours compared to the State designated and posted route through Boston which is approximately "7 miles and 30 minutes each way" The State Route posted on the MA Turnpike web page is very close in design to the previous Boston Route running approximately 8.2 miles and 34 minutes each way. Boston's actions have obstructed compliance with federal routing standards, impeded commerce and created a severe economic burden on carriers, and operators who want to comply with hazardous materials transportation laws. See FMCSA-2008-0204-0016, Exhibits A and B.
- e) Boston's existing hazardous material transportation regulations and routing scheme, without benefit of grandfathering or preemptive waiver, presents a carrier with confusing dual compliance and an obstacle to compliance with federal law. See Dockets FMCSA-2008-0204-0009, page 2 Abstract, FMCSA-2008-0204-0016, page 3 and exhibits A and B, FMCSA-2008-0204-0002, paragraphs B1 and B2, FMCSA-2008-0204-0023.1, pages 2-3, and FMCSA-2008-0204-0030.

**B. Docket FMCSA-2008-0204-0001. American Trucking Association Application [73 FR 46349]  
Determination of whether Federal law preempts highway routing designations issued by the City of Boston restricting transportation of certain hazardous materials.**

1. Part 397 of Title 49, Code of Federal Regulations speaks to NRHM Highway routing Designations; preemption.
  - a) The FHWA in implementing the requirements of the HMTUSA in subpart C, Routing, in Part 397 of Title 49, Code of Federal Regulations established Federal standards and procedures which States and Indian tribes are required to follow if they *establish, maintain, or enforce routing designations for the highway transportation of non-radioactive hazardous materials (NRHM)*. The intent of these requirements is to ensure that NRHM are moved safely and that commerce is not burdened by restrictive, uncoordinated, or conflicting requirements of various jurisdictions. The standards and requirements of this regulation allow for the flexibility intended in the HMTUSA. The federal agency does not designate routes used for transporting NRHM. Any State or Indian tribe that chooses to establish, maintain, or enforce NRHM routing designations is required to comply with the Federal standards established in 49 CFR 397.71. The States and Indian tribes are also required to ensure that any NRHM routing designations by political subdivisions under their jurisdiction are established, maintained, and enforced in accordance with the regulation. Any NRHM routing designations that fail to comply with the standards can be preempted.
  - b) This regulation establishes standards which closely follow the specific requirements of 49 U.S.C. § 5112(b) and include procedures for States and Indian tribes to follow if they impose routing designations for NRHM transportation by motor carriers. The Federal standards provide for



enhancement of safety; public participation; consultation with other State, local, and tribal governments; through routing; reasonable time to reach agreement between affected States or Indian tribes; not unduly burdening commerce; timely establishment of State and Indian tribe routing; reasonable routes to terminals; State responsibility for local compliance; and a number of "factors to consider." The list of "factors to consider" which States (political subdivisions) and Indian tribes are required to use in regulating routing is contained in § 397.71 of this final rule and includes the factors required by 49 U.S.C. § 5112(b)(1)(I) and additional factors addressing climatic conditions, congestion, and accident analysis.

- c) State and political subdivision NRHM routing prohibitions, modifications, restrictions, designations, limitations or requirement regulations established maintained or enforced on or after November 14, 1994, triggered Factors listed at 49 USC 5125(b)(1) and Standards listed at 49 CFR 397.71 of the amended 49 USC §§ 5101 et seq., and regulations prescribed under 49 CFR part 397, subpart C.

## 2. Chronology

- a) Dates are important when applying federal hazardous material transportation laws and regulatory oversight to the preemption standards review of Boston's hazardous materials transportation and NRHM routing regulations. November 16, 1990, the enactment of the HMTUSA and November 14, 1994, the effective date of the amended 49 CFR subpart C are critical dates.
  - i. Boston's NRHM routing prohibitions, regulations, modifications, restrictions, designations, limitations or requirement in place on November 14, 1996 (two years from the effective date of the regulation) that were an obstacle or forced dual compliance and were without waiver of preemption were preempted. [49 CFR 397.69]
  - ii. Boston's NRHM routing prohibitions, regulations modifications, restrictions, designations, limitations or requirements *established, maintained, or enforced after November 14, 1994*, (the effective date of the regulation) which are established maintained, or enforce [49 CFR 397.69] are subject to Standards [49 CFR 397.71]; (1) Enhancement of public safety, (2) Public participation, (3) Consultation with others, (4) Through routing, (5) Agreement of other States, (6) Timeliness, (7) Reasonable routes to terminals and other facilities, (8) Responsibility for local compliance, and (9) Factors to consider. In establishing any NRHM routing designations. The Factors are; (i) Population density, (ii) Type of highway, (iii) Types and quantities of NRHM, (iv) Emergency response capabilities, (v) Results of consultation with affected persons, (vi) Exposure and other risk factors, (vii) Terrain considerations, (viii) Continuity of routes, (ix) Alternative routes, (x) Effects on commerce, (xi) Delays in transportation, (xii) Climatic conditions, and (xiii) Congestion and accident history.
- b) Date Significant to Boston's Regulations [Extracted from the Federal Register and Docket FMCSA-2008-0204-et seq.]

February 6, 1978	Materials Transportation Bureau (MTB) Incorporates Federal Motor Carrier Safety Regulations by Reference. Under authority of the HMTA, 49 U.S.C. 1801 et seq. A new § 177.804 is added to read: "Motor Carriers and other persons subject to this Part shall comply with 49 CFR Parts 390 through 397 ( <i>excluding §§ 397.3 and 397.9</i> ) to the extent those rules apply. [43 FR 4858]
August 17, 1978	MTB published advanced notice of proposed rulemaking. This rulemaking examined the transportation safety aspects of highway routing of "radioactive" materials. Existing regulations § 397.9 Routes, § 397.3 State and local laws, ordinances and regulations, and § 177.810 Vehicular tunnels described and examined. [43 FR 36492]
December 12, 1979	Boston Ordinances chapter 39 of 1979, Regulating the Transportation of Hazardous Materials [FMCSA-2008-0204-0004 Exhibit A]
December 15, 1980	Boston Regulations - Transportation of Hazardous Materials effective [FMCSA-2008-0204-0004 Exhibit B, FMCSA-2008-0204-0015.1, Para I. Response to Specific DOT Requests For Comment, Docket FMCSA-2008-0204-0015.4 Exhibit B]
February 5, 1980	Plaintiff ATA et al files for Inconsistency Ruling (IR) [46 FR 18918]
March 24, 1980	DOT MTB published Notice of Invitation to Comment [45 FR 19110]
1980	Central Artery Tunnel Project – "The Big Dig".(CA/T) Project in design phase

March 2, 1981	Plaintiff ATA et al vs Boston files Civil Action for Temporary Restraining Order in US District Court Boston [CA-81-0628-MA and FMCSA-2008-0204-0004 Exhibit D]
March 3, 1981	US District CRT Grants ATA a temporary restraining order
March 26, 1981	DOT Rules on IR filed on February 5, 1981, [FMCSA-2008-0204-0004 Exhibit C and 46 FR 18918, IR-3]
March 26, 1981	Boston Appeals IR-3 ruling [FMCSA-2008-0204-0004 Exhibit E, 46 FR 18918 and 47 FR 18457]
April 1, 1981	US District Court Boston. Plaintiff ATA et al vs. Boston files Civil Action for Temporary Injunction. [CA-81-0628-MA and FMCSA-2008-0204-0015.05 Exhibit C]
April 29, 1982	DOT Rules on IR-3 Appeal. See March 26, 1981
April 7, 1988	Research and Special Programs Administration (RSPA) publishes advanced notice of proposed rule making relating to the highway routing of placarded non-radioactive hazardous materials. Docket HM-203. [53 FR 11618]
<b>November 16, 1990:</b>	<b>Public Law 101-615 [S. 2936], the Hazardous Materials Transportation Uniform Safety Act Of 1990 (HMTUSA) enacted</b>
July 10, 1991	Secretary of Transportation designates the Federal Highway Administration (FHWA) responsibility for Highway Routing of Hazardous Materials [56 FR 31343]
September 1991	CA/T project Bypass Road through South Boston to take truck traffic off neighborhood streets and on the third tunnel to cross Boston Harbor
1991	CA/T project Federal Highway Administration issues Record of Decision. CA/T construction go-ahead Construction on Ted Williams Tunnel starts late in 1991.
August 31, 1992	Federal Highway Administration (FHWA) provides notice of proposed rulemaking (NPRM) "Transportation of Hazardous Materials; Highway Routing" [57 FR 39522]
September 24, 1992	The FHWA published an interim final rule [57 FR 44132] amending 49 CFR 397 by adding a subpart E which established procedures applicable to preemption determinations and waivers of preemption.
June 23, 1994	CAT/T Transportation of Hazardous Materials, study released [FMCSA-2008-0204-0004 Exhibit H]
October 12, 1994	Federal Highway Administration provides notice of Final Rule "Transportation of Hazardous Materials; Highway Routing" [FMCSA-2008-0204-0004 Exhibit J FR 51824]
<b>November 14, 1994</b>	Effective date of 49 CFR Regulations implementing the requirements of HMTUSA in a new Part 397 Subpart C—Routing of Non-Radioactive Hazardous Materials [59 FR 51824]
<b>November 14, 1996</b>	Sunset for compliance with 49 CFR. Two years from November 14, 1994, effective date of the Regulation.
1997	Metropolitan Highway System (MHS) act [Chapter 3 Acts of 1997]
1999	CA/T. Bridge across the Charles River connecting I-93 in Charlestown with Leverett Circle and Storrow Drive opened in the fall of 1999
January 2003	CA/T. The I-90 extension through South Boston to the Ted Williams Tunnel and Logan Airport opened in January 2003
March 2003	CA/T. The northbound lanes of the underground highway replacing the elevated Central Artery opened
December 2003	CA/T. The southbound lanes opened on a limited basis.
2004	CA/T The elevated highway demolished.
January 13, 2006	CA/T. Substantial completion of CAT/P took place in early 2006.
June 19, 2006	Boston Transportation Department inserted Art VII section 8B, <i>effective June 19, 2006</i> into city Transportation regulations changing its hazardous materials (NRHM) and routing designations, limitations, or requirements. [See Docket FMCSA-2008-0204-0017.1, G. Cross Street and the Major Thoroughfare System, 2nd paragraph, page 17.]
July 3, 2006	Boston Fire Department changes its hazardous materials transportation Permit requirements affecting (NRHM) routing designation, and limitations and amended

- the route *effective July 3, 2006*. [See Docket FMCSA-2008-0204-0023.1, Page 2, and FMCSA-2008-0204-0017.1, Footnote 15, page 18.]
- 2006 CAT/T project. The surface streets were restored and the Rose Fitzgerald Kennedy Greenway and other parks built by the project were opened.
- 2006 – 2008 Boston hazardous materials transportation enforcement scheme continues based on local 1980 regulations incorporating 49 CFR 397 as amended. See Docket FMCSA-
2. Boston's Regulations have since established have been modified.
- a) "The established downtown route has always been in the same corridor, but it has been *adjusted* through the years to accommodate changes to the physical road locations and configurations caused by the Big Dig." [FMCSA-2008-0204-0017.1, II. Summary of Comments. Pg. 17].
- b) "In 2006, in order to take advantage of these surface roadway improvements to increase public safety in connection with the transportation of hazardous materials within the City, the City, acting through the Boston Transportation Commission, determined that it was in the public interest and prudent to *adjust the local hazmat route* for the local delivery of regulated hazardous materials within the City where there is a point of origin or destination (delivery point) within the City. This was accomplished through administratively updating<sup>14</sup> the City's Major Thoroughfare System to reflect the new improved physical roadway alignments, including Cross Street, and continues to provide a surface route for hazardous cargo with a point of origin or destination within the City. This *route adjustment, effective July 3, 2006*, involved an insignificant shift one roadway over within the same central corridor through downtown Boston, shifting hazmat traffic from Commercial Street to the newly improved Cross Street (both streets being entirely *within* Downtown Boston)." [FMCSA-2008-0204-0017.1, III. History And Background, Pg. 17]
- c) MA Turnpike Authority, within the Executive Office of Transportation and Public Works, has currently designated and posted a hazardous material through-route. [MA Turnpike Web Site visited 11/1/08. <http://www.masspike.com/travel/trucking/hazardous.html>]
3. Boston's regulations have been *enforced* after November 14, 1994.
- a) See Violation Enforcement Citations. Docket 2008-0204-0016, Exhibit D
4. Boston's permitting process was not established to enhance public safety but rather to raise revenue.
- a) Docket FMCSA 2008-0204-0017.1, Paragraph III A states, "the Fire Commissioner and the Commissioner of Health and Hospitals to take steps to ensure the public health and safety. Subparagraph (4) goes on to state the "public health and safety steps taken by the regulation:
- (4) establish a permit system which requires, among other things, that carriers who wish to operate their vehicles inconsistently with the standards set forth in the Ordinance and/or regulations thereunder obtain permits for doing so, and that such permits will issue only where a *compelling need* is shown and where transporting hazardous materials is *in the public interest*. These permits satisfying a *compelling need* and in the *public interest* were allowed under the Boston regulation section 5.04 [Docket FMCSA-2008-0204-0015.04 Exhibit B]
- b) March 6, 1984, Dr Edward V. Clougherty, Boston FD Chemist, in testimony before the District Court Magistrate identified himself as the father, overseer and interpreter of the Boston Fire Department Hazardous Materials Regulations. Dr. Clougherty went on to explain the public health and safety benefits of "*compelling need*" and "*public interest*" in transcribed testimony.
- c) Testimony of Dr. Edward V. Clougherty, Boston Fire Department. Dr. Clougherty was assigned oversight for establishing the Boston Hazardous Materials Transportation Regulation. Docket FMCSA 2008-0204-0015.11, Exhibit of the City of Boston. Transcribed Testimony admitted to Magistrate of the US District Court [Civil Action No.81-0628-MA and FMCSA-2008-0204-0015.5 Exhibit C., pages 1-169 to 1-229]

**Page 1-169, line 14-18**

Q. Who makes the decision as to the appropriate route under the city of Boston Regulations?

A. We really don't designate any routes. We tell people where they can't go.



**Page 1-191, line 20-24**

Q. Do you have responsibilities over the actual permitting process?

A. Yes

Q. Have you had responsibilities over the permitting process since the regulations were promulgated?

**Page 1-192, line 2- 24**

A. Yes

Q. Can you describe your responsibilities?

A. Well, initially I was of course involved in the drafting of the regulations and public hearing, etc. and correspondence and testified at the – and was involved in the initial action in the federal Court. And then as we put the regulation into effect, I worked directly with the officers that were assigned, saw that they learned the regulations saw that they developed a background in hazardous materials. And at the early stages looked at the details of every application, went out and did some enforcement, and gradually tried to turn these regulations over to a more standard operating procedures within the Fire Prevention Division and allowed the officers in the department to take on more and more responsibility. So that at this point I'm trying to turn this administratively and the workings of it over to the fire prevention division, and that's what the department wants. Never intended that I would be involved in this for the period of time that I

**Page 1-193, line 1- 5**

have been.

Q. Are you still involved with it.

A. Yes

Q. On a daily basis?

A. On a daily basis.....

**Page 1-228, line 23**

Q. What is the meaning --- what does "compelling need" mean to you when you pass upon a permit application

**Page 1-229, line 1-14**

A. Well. A gas station, obviously a compelling need is to stay in business and have product to sell. And if he can't receive the product during the unrestricted hours, typically would be after 8:00 in the morning and before 6:00 in the morning, then he has a compelling need to have the product delivered during the hours which will require the trucks to go through the city.

Q. Sir, your saying compelling need is economic hardship?

A. Yes

Q. Is that what compelling need means?

A. That's one form.

**Page 1-229, line 21-**

Q. Well, what does transportation of the hazardous materials is in the public interest, what is "the public interest" mean?

A. We never really defined it, but obviously it is in the public interest to have, again, gasoline available. It's pretty difficult to live in this ---- particularly in this area of the country without having gasoline available to you.

Q. Which public's interest are we talking about? Are we talking about the city of Boston's interest?

A. No, any public interest.

5. Boston's *routing designations for the highway transportation of non-radioactive hazardous materials (NRHM) as establishment, with political prohibitions modifications, limitations, and restrictions etc. as maintained, and enforced* are against the stated findings and intent of Congress and the requirements of Part 397 to ensure that NRHM are moved safely and that commerce is not burdened by restrictive, uncoordinated, or conflicting requirements of various jurisdictions. A preemptive waiver of the current Boston NRHM routing prohibitions will not provide an equal or higher level of highway safety to the public without unreasonably burdening commerce.

**V. Foundation for Rebuttal Comments**

In the 1990 amendments to the HMTA, Pub. L. 101-615 (Nov. 16, 1990), preemption under the HMTA was strengthened on the basis of the following Congressional findings:

“(3) many States and localities have enacted laws and regulations which vary from Federal laws and regulations pertaining to the transportation of hazardous materials, thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements,

(4) because of the potential risks to life, property, and the environment posed by unintentional releases of hazardous materials, consistency in laws and regulations governing the transportation of hazardous materials is necessary and desirable,

(5) in order to achieve greater uniformity and to promote the public health, welfare, and safety at all levels, Federal standards for regulating the transportation of hazardous materials in intrastate, interstate, and foreign commerce are necessary and desirable.”

In amending the HMTA, Congress affirmed that “uniformity was the linchpin” of the statute.<sup>7</sup> Unless a waiver of preemption is granted by DOT, the HMTA as amended explicitly preempts “any requirement of a State or political subdivision thereof or Indian tribe” not “otherwise authorized by Federal law” if

(1) Compliance with both the State or political subdivision or Indian tribe requirement and any requirement of [the HMTA] or of any regulation issued under [the HMTA] is not possible,

(2) The State or political subdivision or Indian tribe requirement as applied or enforced creates an obstacle to the accomplishment and execution of [the HMTA] or the regulations issued under [the HMTA], or

(3) It is preempted under section 105(a)(4) [49 App. U.S.C. Sec. 1804(a)(4), concerning “covered subjects”] or section 105(b) [49 U.S.C. Sec. 1804(b), concerning highway routing requirements]. 49 App. U.S.C. 1811(a).

The first two paragraphs codify the “dual compliance” and “obstacle” criteria that RSPA had applied in issuing inconsistency rulings prior to the 1990 amendments to the HMTA. These criteria derive from U.S. Supreme Court preemption decisions. E.g., *Ray v. Atlantic Richfield, Inc.*, 435 U.S. 151 (1978); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

The third paragraph, 49 App. U.S.C. 1811(a)(3), in conjunction with 49 App. U.S.C. 1804(a)(4), specifies five “covered subject” areas in which non-Federal requirements are given particular scrutiny:

(i) The designation, description, and classification of hazardous materials.

(ii) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials.

(iii) The preparation, execution, and use of shipping documents pertaining to hazardous materials and requirements respecting the number, content, and placement of such documents.

(iv) The written notification, recording, and reporting of the unintentional release in transportation of hazardous materials.

(v) The design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold as qualified for use in the transportation of hazardous materials.

In these areas, a non-Federal requirement that is “not otherwise authorized by Federal law” is preempted unless it is “substantively the same” as the HMTA or HMR requirement. 49 App. U.S.C. 1811(a). To be “substantively the same,” the non-Federal requirement must “conform in every significant respect to the Federal requirement. Editorial and other similar de minimis changes are permitted.”<sup>8</sup>

A more limited preemption test, independent of 49 App. U.S.C. 1811(a), applies when the non-Federal requirement is being compared to FMCSR provisions incorporated into the HMR through 49 CFR 177.804. RSPA has declared that in enacting 49 CFR 177.804, it did not intend to change the preemptive effect of those FMCSR provisions

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<sup>7</sup> Colorado Pub. Util. Comm'n v. Harmon, 951 F.2d 1571, 1575 (10th Cir. 1991)

<sup>8</sup> 49 CFR 107.202(d)

incorporated.<sup>9</sup> The preemptive effect of FMCSR training requirements, 49 CFR 390.3(e)(2) and 392.1, is set forth at 49 CFR 390.9:

Except as otherwise specifically indicated, subchapter B of this chapter [49 CFR Parts 350-399] is not intended to preclude States or subdivisions thereof from establishing or enforcing State or local laws relating to safety, the compliance with which would not prevent full compliance with these regulations by the person subject thereto.

This standard essentially is the “dual compliance” standard.<sup>10</sup> Any FMSCR provision incorporated into the HMR solely through 49 CFR 177.804 therefore preempts a State or local requirement “only if compliance with both is impossible.”<sup>11</sup>

In place of the prior process for issuing advisory inconsistency rulings, the HMTA authorizes any directly affected person to apply to the Secretary of Transportation for a preemption determination with respect to a requirement of a State, political subdivision or Indian tribe.<sup>12</sup> Preemption determinations under authority of the HMTA address preemption only by the HMTA, and not by the Commerce Clause of the Constitution or federal statutes other than the HMTA. Other statutes may be relevant to determining HMTA preemption, for instance in establishing whether a non-Federal requirement is “otherwise authorized by Federal law.”<sup>13</sup>

The US Secretary of Transportation has delegated to RSPA the authority to make preemption determinations, except for those concerning highway routing, which are delegated to the Federal Highway Administration.<sup>14</sup> Under RSPA's regulations, preemption determinations are issued by RSPA's Associate Administrator for Hazardous Materials Safety.<sup>15</sup> If the HMTA preempts a requirement of a State, a political subdivision of a State or an Indian tribe, that jurisdiction may apply for a waiver of preemption under 49 CFR 107.215 through 107.227. A waiver may be granted if the Associate Administrator finds that the non-Federal requirement affords the public a level of safety equal to or greater than that afforded by the HMR, and that it does not *unreasonably burden commerce*. Alternatively, the jurisdiction may petition under 49 CFR 106.31 for adoption of a uniform Federal rule.

Preemption determinations under the HMTA are consistent with the principles and policy set forth in Executive Order No. 12,612 (“Federalism”).<sup>16</sup> Section 4(a) of that Executive Order authorizes preemption of State laws only when a statute contains an express preemption provision, there is other clear evidence of Congressional intent to preempt, or the exercise of State authority directly conflicts with the exercise of Federal authority. The HMTA contains an express preemption provision.

In the relatively recent words of FMCSA Administrator John H. Hill in correspondence to Massachusetts Highway officials, “...it appears you may have overlooked certain requirements governing the routing of hazardous materials for newly established highway systems”.<sup>17</sup>

*With enactment on, November 16, 1990, of the Hazardous Materials Transportation Uniform Safety Act (HMTUSA), Congress changed the law, populating the NRHM transportation field, Boston's 1980 antiquated, conflicting, and confusing hazardous materials regulations did not follow suit! The result is this 2008 preemption review.*

*“Quod ab initio non valet, in tractu temporis non convalescit”*

## VI. Summation

In the opinion of WMS Services the City of Boston's current Hazardous Material Transportation Regulations and application of Certain Hazardous Material and Non Radioactive Hazardous Material Through Routing and

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<sup>9</sup> IR-22, 52 FR 46574 (Dec. 8, 1987).

<sup>10</sup> R-32, 55 FR 36736, 36741 (Sept. 6, 1990)

<sup>11</sup> IR-32, 55 FR at 36741.

<sup>12</sup> 49 App. U.S.C. 1811(c)(1)

<sup>13</sup> 49 App. U.S.C. 1804(a)(4)(A)

<sup>14</sup> 49 CFR 1.53(b)

<sup>15</sup> 49 CFR 107.209(a)

<sup>16</sup> 52 FR 41685 (Oct. 30, 1987)

<sup>17</sup> June 27, 2007 correspondence from Administrator Hill to Matthew J Amorello, Chairman, Massachusetts Turnpike Authority. [Docket FMCSA-2008-0204-0002, Exhibit B]. The same words were again reiterated by Administrator Hill in correspondence to Bernard Cohen, Massachusetts Secretary of Transportation and Construction in February 15, 2008, correspondence from Administrator Hill to Bernard Cohen, Massachusetts Secretary of Transportation and Construction, [Docket FMCSA-2008-0204-0002, Exhibit D]

Transportation prohibitions, limitations, requirements, and routing modifications [routing designations]<sup>18</sup> were politically established and are enforced against the stated intent and findings of Congress in enacting the HMTUSA, they are confusing, conflict with current federal and state law and regulations, interrupt the continuity of intrastate and interstate movement of placarded flammable and combustible liquids, impede and unnecessarily delay transportation of NRHM between terminals, pickup and drop off points, north and south of the city, place an unreasonable and dangerous burden on intrastate and interstate commerce, a financial burden on motor fuel and home heating oil transporters and the public, expose CDL operators to potential drivers license disqualification issues and unsuspecting local communities to public safety and environmental hazards for which they may not be aware of, prepared for, or have the resources to contend with, thereby unnecessarily endangering the safety of a larger portion of the population, the environment in addition to placing an unnecessary burden on commerce.

Owners and operators face dual and obstacles to compliance with requirements of federal regulations and Boston's routing and transportation restrictions, prohibitions, limitations, and regulations as applied and enforced by the city. Dual compliance is not possible and creates an obstacle to the accomplishment and execution of the HMTA<sup>19</sup>.

For these reasons WMS Services' requests the Administrator, Federal Motor Carrier Safety Administration, to provide a determination which preempts conflicting city routing and transportation restrictions prohibitions and limitations applicable to Non Radioactive Hazardous Material and/or all Hazardous Material and additionally establish a reasonable time frame for the city and state to comply with sovereign federal laws and standards as determined by the Administrators preemptive review or suffer a penalty if the city of Boston or state fails to comply.

#### **CERTIFICATION OF SERVICE**

I hereby certify that I have this date submitted a copy of my comments herein to the American Trucking Associations Inc., Attn: Richard Moskowitz, Vice President and Regulatory Affairs Counsel, 950 N. Glebe Road Arlington, VA 22203 and Mass Highway, Attn: Monica E. Conyngham, Chief Counsel, Massachusetts Transportation Building, Park Plaza, Suite 3170, Boston, MA 02116.

Respectfully submitted,

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Chelsea A. Shaughnessy  
WMS Services

Certified Mail: 7008 1140 0001 1717 3739

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<sup>18</sup> 49 CFR 397.201(c)

<sup>19</sup> 49 CFR 397.203(a)(1) and (2)